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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ZAC SMITH & COMPANY, INC.,
Petitioner,

v.

OTIS ELEVATOR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

Whether the Federal Constitution will permit a Texas Court to assert *in personam* jurisdiction over a Florida corporation, whose single contact with Texas was an unconsummated joint venture agreement with a Texas corporation, where the plaintiff's cause of action arises out of a contract between the plaintiff and the same Texas corporation, and the plainitff claims that contract is related to the unconsummated joint venture agreement between the Florida corporation and the Texas corporation.

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OPINIONS BELOW

The final opinion of the Texas Supreme Court appears in the Appendix to this Petition, with the dissenting opinion of Justice Robertson, in which Justice Ray and Justice Wallace joined. (App. pp. 1a-10a). Also appearing in the Appendix are the opinion of the Court of Appeals of the State of Texas (App. pp. 11a-15a), and the Trial Court's decision (App. pp. 16a-18a), and order (App. pp. 19a-20a) granting Petitioner's Special Appearance and Motion to Dismiss on the grounds of lack of *in personam* jurisdiction.

The opinion of the Texas Supreme Court is reported at 734 S.W.2d 662 (Tex. 1987). The opinion of the Court of Appeals is reported at 715 S.W.2d 806 (Tex. App.—Austin 1986).

JURISDICTION

On September 16, 1987, the Texas Supreme Court denied Petitioner's Motion for Rehearing to reconsider the judgment rendered on July 8, 1987. (App. p. 23a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1987).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 6, 1983, Double W Investors (Double W), the owner of a tract of land located in Austin, Texas, entered into a contract with Advanced Concrete of Texas, Inc. ("Advanced Concrete") to construct a hotel on that land. This contract contained an express condition precedent that obligated Advanced Concrete to obtain a sufficient bond to cover its work. Neither Double W nor Advanced Concrete is a party to this appeal.

Upon learning of the project to build a hotel, Respondent Otis Elevator Company ("Otis Elevator") solicited Advanced Concrete for a contract to provide four elevators for the project. After some negotiation, Otis Elevator and Advanced Concrete signed a contract on October 25, 1983.

In order to satisfy its obligation to secure bonding for the project, Advanced Concrete later entered into a pro-

posed joint venture agreement with Petitioner Zac Smith & Company, Inc., ("Zac Smith"), a Florida corporation, on October 31, 1983. This agreement was executed in Florida and returned by mail from Zac Smith in Pensacola, Florida to Advanced Concrete in Shreveport, Louisiana, on November 2, 1983. The negotiation and execution of this agreement occurred entirely outside the State of Texas.

Zac Smith was not a signatory to the contract between Otis Elevator and Advanced Concrete. Zac Smith knew nothing of the elevator contract until Otis Elevator filed this lawsuit more than a year after the contract was signed. Otis Elevator only heard a rumor that Advanced Concrete was involved in some kind of joint venture or partnership with Zac Smith on the project several months after the elevator contract. In negotiating with Otis Elevator, Advanced Concrete made no reference to Zac Smith or a joint venture. Otis Elevator ran a credit check only on Advanced Concrete, and not Zac Smith or any joint venture. Otis Elevator extended credit only to Advanced Concrete, and not to Zac Smith or any joint venture. There was never an elevator contract to which Zac Smith was a party.

Some three months after Advanced Concrete and Otis Elevator signed their contract, Advanced Concrete, Zac Smith, and Double W signed a new contract for the construction of the hotel. This contract was substantially similar to the one earlier signed by Advanced Concrete, and was similarly conditioned upon the issuance of a bond to cover work on the project. Two months later, a conditional bond escrow agreement was issued for the project, and that agreement was contingent upon Double W securing financing to pay for the project. This agreement was never signed, and the bonds were never issued, because Double W never obtained financing for the project. As a result, the whole proposed joint venture was frustrated; the project literally never got off the ground.

In June 1984, Otis Elevator attempted to deliver the four elevators, but found the project had not even broken ground. Subsequently, Otis Elevator filed a lawsuit for breach of contract against Advanced Concrete and Zac Smith, alleging the existence of a joint venture or partnership. Otis Elevator obtained a default judgment against Advanced Concrete for all damages sought. Advanced Concrete has not appealed that judgment.

Zac Smith specially appeared before the Trial Court pursuant to Tex. R. Civ. P. 120a, and contested the Trial Court's exercise of *in personam* jurisdiction. (App. pp. 25a-27a, 30a). The Trial Court ruled that Zac Smith had no physical contact with Texas, and that Otis Elevator's cause of action did not arise out of any contact Zac Smith had with Texas. (App. pp. 16a-18a). The Trial Court granted Zac Smith's Special Appearance and Motion to Dismiss for lack of *in personam* jurisdiction. (App. pp. 19a-20a).

The Court of Appeals reversed the judgment of the Trial Court and held that Texas courts could maintain *in personam* jurisdiction over Zac Smith. (App. pp. 11a-15a).

The Texas Supreme Court subsequently affirmed the decision of the Court of Appeals. (App. pp. 1a-8a). Six Justices of the Court joined in an opinion which held that Zac Smith had sufficient minimum contacts with Texas to support *in personam* jurisdiction. Justice Robertson dissented from the majority holding in an opinion joined by Justices Ray and Wallace. (App. pp. 9a-10a). The three dissenting Justices concluded that the key facts of the case would not support *in personam* jurisdiction over Zac Smith.

REASONS FOR GRANTING THE WRIT

In upholding *in personam* jurisdiction over Zac Smith, the Texas Supreme Court violated the restraints on state power under the due process clause of the fourteenth amendment. Zac Smith had only a single contact with

Texas. The Plaintiff's cause of action does not arise out of that contact, but is only remotely related to it through a third party. The decision of the Texas Supreme Court under these facts excessively extends the ability of Texas courts to exert power over the citizens of other states. Therefore, this decision has far-reaching implications concerning the division and balance of judicial power among the states, implications which must be addressed by this Court.

INTRODUCTION

The Texas Supreme Court has ruled that the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code §§ 17.041-17.045, permits Texas courts to exercise the broadest possible *in personam* jurisdiction, limited only by constitutional considerations of due process. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). Because of this expansive interpretation of the statute's reach, "the usual two step analysis and inquiries respecting personal jurisdiction collapse into a single search for the outer limits of what due process permits." *Church of Scientology v. Adams*, 584 F.2d 893, 896 (9th Cir. 1978).

For more than forty years, this Court has applied one constitutional standard to *in personam* jurisdiction cases in defining the outer limits of due process. The standard is that due process requires that the nonresident defendant have "certain minimum contacts with [the forum state] such that the maintenance of the lawsuit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

This case concerns a Texas court's exercise of "specific," as opposed to "general," *in personam* jurisdiction over Zac Smith. "[D]ue process requires that there be *continuous and systematic contacts* between the State and the foreign corporation to support an exercise of "general" personal jurisdiction." *Bearry v. Beech Air-*

craft Corp., 818 F.2d 370, 374 (5th Cir. 1987). Zac Smith's activities in Texas were never alleged to be substantial, or continuous and systematic. In fact, the Texas Supreme Court acknowledged in its opinion that Zac Smith had no physical ties to Texas. (App. p. 6a).

In applying the mandate of *International Shoe*, Texas courts and many federal courts have used a three part test to evaluate the quality and nature of the nonresident defendant's contacts when "specific" jurisdiction is alleged:

1. The non-resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.[1]

2. The claim must be one which arises out of or results from the defendants' forum-related activities.[2]

3. The exercise of jurisdiction must be reasonable.[3]

Pacific Atlantic Trading Co., Inc. v. M/V Main Express, 758 F.2d 1325, 1327 (9th Cir. 1985); *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966). This 3-step evaluation is but a convenient methodology by which any court must satisfy the "minimum contacts" standard.

In this case, the Texas Supreme Court clearly misapplied each part of the constitutional test in reaching its decision. The three justices of the Texas Supreme Court who dissented from the decision to uphold jurisdiction over Zac Smith, concisely stated the key facts which demonstrate the error of the majority opinion.

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[1] *Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958).

[2] *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Hanson*, 357 U.S. at 251-52.

[3] *International Shoe Co.*, 326 U.S. at 316.

> The *only* contact that Smith has with Texas is a proposed joint venture agreement with Advanced Concrete which was specifically conditioned on the satisfactory and sufficient bonding of the project. No bond was ever issued and the joint venture agreement was never consummated. Furthermore, the contract for the elevators, which is the center of this litigation, was *solely* between Otis [Elevator] and Advanced Concrete. Smith did not ratify the contract and Smith was not even associated with Advanced Concrete until after the contract was created.

(App. p. 10a). (Emphasis added.) These facts establish that Zac Smith's sole contact with Texas fails to satisfy all three parts of the Constitutional test.

I. The Decision of the Texas Supreme Court Is Contrary to the Decisions of This Court in *Hanson v. Denckla*, 357 U.S. 235 (1958), and *Burger King Corp. v. Rudzewicz*, —— U.S. ——, 105 S. Ct. 2174 (1985). Because the Texas Supreme Court Upheld *In Personam* Jurisdiction Over Zac Smith Based Upon (1) The Unilateral Activity of a Third Party Claiming Some Relationship With Zac Smith, and (2) a Single Unconsummated Contract.

To confer *in personam* jurisdiction in Texas, Zac Smith's contact with Texas must have resulted from its own purposeful activity. The nonresident defendant's contact with the forum must not have resulted from the unilateral activity of a third party.

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of [minimum] contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activity within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253-4 (1958).

Such unilateral activity is precisely the basis for the jurisdiction asserted here. Zac Smith did not engage in any "purposeful activity" in Texas because:

1. The contract upon which Otis Elevator's cause of action is based is a product of the unilateral actions of Otis Elevator and Advanced Concrete.
2. The application for a building permit for the proposed hotel was obtained through the unilateral actions of third parties.
3. The proposed joint venture agreement is an insufficient contact.

Several undisputed facts support these propositions:

1. Zac Smith did not even sign the proposed joint venture agreement with Advanced Concrete until *after* Advanced Concrete had already signed the contract to purchase the elevators from Otis Elevator.
2. Otis Elevator solicited the contract from Advanced Concrete, and not Zac Smith.
3. Zac Smith was not a signatory to the elevator contract; the only signatories to the elevator contract were Otis Elevator and Advanced Concrete.
4. Advanced Concrete never mentioned Zac Smith in its negotiations with Otis Elevator.
5. Zac Smith did not know of the elevator contract until it was served with a copy of Otis Elevator's lawsuit more than a year after the date of the elevator contract.
6. Double W never obtained the financing to build the hotel, which was the *sine qua non* of the entire project.
7. Because no financing was obtained for the hotel project, no bonding was issued to cover construction, the bonding being a precondition to the construction contract.

The very basis for Otis Elevator's cause of action, its contract with Advanced Concrete, is the product of the unilateral actions of both Otis Elevator and Advanced Concrete. Otis Elevator solicited Advanced Concrete for the contract. Advanced Concrete negotiated the elevator contract by itself on its own behalf. Zac Smith was unaware of the elevator contract and neither authorized Advanced Concrete to act on its behalf nor ratified the contract. The only authorization even provided by Zac Smith to Advanced Concrete was executed several months after the elevator contract. The authorization was not retroactive and did not specifically authorize any action with regard to elevators. Advanced Concrete signed the contract with Otis Elevator and never told Zac Smith about it. This is the essence of third party unilateral activity which cannot satisfy the requirement of purposeful contacts with the forum. *Hanson*, 357 U.S. at 253; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

The building permit is an even clearer example of unilateral activity undertaken by a third party. The application for the building permit, dated November 1983, notes the name and the address of the contractor, Advanced Concrete—in typed print. However, a peculiar handwritten notation also appears on the application. Scribbled beneath the name of the contractor are the words, "And Zac Smith Co., A Joint Venture." There is no evidence indicating who made this handwritten entry.[4] There is no evidence that either Zac Smith or any one acting on his behalf travelled to Austin, Texas to request a building permit. Certainly no one from Advanced Concrete was authorized to act on behalf of Zac Smith. Only several months later did Zac Smith send a letter to Advanced Concrete authorizing a Mr. Watkins to act on behalf of the proposed joint venture.

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[4] Petitioner's legal name is Zac Smith & Company, Inc. There is no explanation for the error in the handwritten entry.

In the trial court, Respondent attempted to introduce the affidavit of an official of the Building Inspection Department of the City of Austin, in order to prove the building permit was issued to the joint venture, including Zac Smith. Petitioner objected to the affidavit's assertion that the permit was issued to the joint venture because such assertion was hearsay and incorrect. The permit itself reflects that it was issued to Austin Motel Assoc., Ltd. and Advanced Concrete. The trial judge sustained Petitioner's objection and would not consider the affidavit for any purpose beyond proving up public records.

Before the Texas Supreme Court, Otis again "introduced" the assertion in the hearsay affidavit that the building permit was issued to the joint venture. The trial court's ruling excluding the statement was correct and was never challenged on appeal by Otis Elevator. The Texas Supreme Court did not reverse this ruling and disclaimed any reliance upon the hearsay affidavit in reaching a decision:

> [T]he only fact in dispute is whether the City of Austin issued a building permit to the joint venture. For the sole purpose of determining jurisdiction, that fact is presumed to favor the trial court's judgment that sufficient contacts with the forum are lacking.

(App. p. 8a).[5]

Whether or not the majority actually relied upon the hearsay affidavit, the building permit and the permit application could not support the proposition that Zac Smith purposefully invoked the benefits and protections

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[5] Notwithstanding this disclaimer, the majority earlier in the opinion stated, without comment, that the "director of the city's building inspection department certified that the permit was issued to "Advanced Concrete of Texas and Zac Smith, JTV.'" (App. p. 6a).

of Texas law. This permit was obtained through the unilateral actions of third parties who could not have acted for Zac Smith.

As to the proposed joint venture agreement itself, this Court has stated that, "an individual's contract with an out-of-state party *alone* cannot automatically establish sufficient minimum contacts in the other party's home forum." *Burger King Corp v. Rudzewicz*, ——U.S. ——, 105 S. Ct. 2174, 2185 (1985). As the dissenting Justices in the Texas Supreme Court pointed out, the proposed joint venture agreement between Zac Smith and Advanced Concrete was Zac Smith's only contact with Texas. Zac Smith had no contract with Otis Elevator.[6] Where a contract is the only contact with the forum state, *Burger King* also requires that other factors be considered, and the Texas Supreme Court failed to properly consider these factors.

> [P]rior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

105 S.Ct. at 2186.

In this case, the actual course of dealing between the parties demonstrated that there was no contract at all.

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[6] In cases where the nonresident had either a *direct* contractual relationship with the resident plaintiff, or a direct relationship *and* other contacts with the forum, many federal courts have still refused to assert *in personam* jurisdiction over the nonresident. *See Colwell Realty Investments, Inc. v. Triple T Inns of Arizona, Inc.*, 785 F.2d 1330 (5th Cir. 1986); *Stuart v. Spademan*, 772 F.2d 1185 (5th Cir. 1985); *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980); *Iowa Electric Light and Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980). In this case, Otis Elevator has *no* direct contractual relationship with Zac Smith.

The project simply never got off the ground. No bond was issued for the project because bonding was conditioned upon adequate financing for the project. The property owner, Double W, never obtained the financing that was a prerequisite to obtaining the bond and building the hotel.

Although Zac Smith and Advanced Concrete certainly contemplated possible future actions directed towards Texas, none of these future expectations were ever realized. As far as Zac Smith was concerned, its dealings with Advanced Concrete ended without any activity ever occurring in Texas. Virtually all of the factors identified and relied upon by the majority of the Texas Supreme Court as contacts with Texas were the unilateral actions of third parties such as Advanced Concrete, undertaken without the knowledge or direction of Zac Smith.

II. The Holding of the Texas Supreme Court That Otis Elevator's Cause of Action Arises Out of or Relates to the Unconsummated Joint Venture Agreement, Zac Smith's Sole Contact With Texas, Is Incorrect and This Case Presents a Question of First Impression, Expressly Left Open by This Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), Concerning the Important Distinction Between a Cause of Action Which Only Relates to, and Does Not Arise Out of, a Nonresident Defendant's Contact With the Forum State.

To establish *in personam* jurisdiction in Texas over Zac Smith, Otis Elevator's cause of action must either arise out of or relate to Zac Smith's contact with Texas. In this regard, this case presents several important questions that have been identified, but not answered by this Court:

a. whether "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with the forum;

b. what sort of tie between a cause of action and a defendant's contacts with the forum is necessary to a determination that either connection exists; and

c. if there is a difference between "arising out of" and "related to," whether a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of" the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

Helicopteros, 466 U.S. at 415 n. 10.

Otis Elevator's cause of action clearly *does not* arise out of Zac Smith's contact with Texas, and it is only remotely related to Zac Smith's contact with Texas. In this case of "specific" *in personam* jurisdiction, this distinction is critically important. Zac Smith's sole contact with Texas is the proposed joint venture agreement with Advanced Concrete. However, Otis Elevator's cause of action does not arise out of such a contact. Otis Elevator's cause of action arises out of one and only one alleged event—Advanced Concrete's breach of its contract with Otis Elevator. The trial judge reached this conclusion and on that basis ruled that Texas courts could not exercise *in personam* jurisdiction over Zac Smith because "the cause of action did not arise out of Zac Smith & Co., Inc.'s contact with Texas, but out of Plaintiff's contract with Defendant Advanced Concrete." (App. p. 17a). The only type of dispute which might have arisen out of Zac Smith's contact with Texas would have been a dispute between Advanced Concrete and Zac Smith.

Otis Elevator's cause of action is only remotely related to Zac Smith's contact with Texas. Several undisputed facts reveal the tenuous nature of this relationship:

1. Otis Elevator solicited the contract from Advanced Concrete, and not Zac Smith.

2. Otis Elevator signed its contract with Advanced Concrete, and not Zac Smith.
3. Otis Elevator signed the contract with Advanced Concrete before Advanced Concrete ever signed the proposed joint venture agreement with Zac Smith.
4. Zac Smith never heard of the elevator contract until Otis Elevator filed this lawsuit.
5. Similarly, at the time Otis Elevator signed its contract with Advanced Concrete, it knew nothing of Zac Smith or any proposed joint venture agreement.

To some extent, the relationship between Otis Elevator's cause of action and Zac Smith's contact with Texas is fortuitous. Zac Smith took no action which caused Otis Elevator to solicit Advanced Concrete. Furthermore, there were other elevator companies that could have entered into a similar contract with Advanced Concrete. Yet, even if there is some relationship, this Court has never held that *any* relationship, no matter how strained or attenuated, would satisfy constitutional due process. There is no substantial connection between Otis Elevator's lawsuit and Zac Smith.[7] That this connection is too attenuated to confer *in personam* jurisdiction follows from the fact that the relationship between Otis Elevator's lawsuit and Zac Smith's contact with Texas is a product of the unilateral activity of Advanced Concrete and not the product of any purposeful activity by Zac Smith. The first two parts of the Constitutional test cannot be considered disjunctively. Otis Elevator's cause of action must have some substantial connection to Zac Smith's purposeful activities directed towards Texas. That substantial connection is missing in this case.

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[7] *See* cases cited *infra* note 4. The holdings of these cases from the Federal Circuits are also relevant to the second part of the Constitutional test. If, as those cases hold, a direct contractual relationship is insufficient to satisfy the Constitutional "minimum contacts" test, certainly the attenuated relationship in his case must also be insufficient.

The majority opinion of the Texas Supreme Court ignored Zac Smith's argument that the proposed joint venture agreement provided an insufficient basis to confer *in personam* jurisdiction.

> Smith also argues that jurisdiction does not attach because the joint venture agreement fails as a matter of law . . . whether the joint venture agreement in fact creates a joint venture goes to the question of liability for the alleged breach, and not to the question of jurisdiction.

(App. p. 7a).

This holding reveals a fundamental error by the majority of the Texas Supreme Court in its application of the second part of the Constitutional test. The proposed joint venture agreement is Zac Smith's only contact with Texas. However, this one contact serves two different purposes in this lawsuit. Otis Elevator had no direct contact with Zac Smith, but is nevertheless asserting a claim against Zac Smith through Advanced Concrete and the proposed joint venture agreement. Similarly, the assertion of *in personam* jurisdiction in this case is not through a direct relationship between Otis Elevator and Zac Smith. The assertion of *in personam* jurisdiction is based upon Zac Smith's relationship with Advanced Concrete. Otis Elevator's cause of action has no connection to Zac Smith other than a connection by way of the proposed joint venture agreement. Therefore, if there was never any joint venture agreement, there could be no connection between Zac Smith and Otis Elevator's cause of action, a connection that the Constitutional test requires.

That Advanced Concrete was authorized to act on behalf of Zac Smith is the essence of Otis Elevator's substantive and jurisdictional claim against Zac Smith. Yet this is no different than an assertion of a simple agency relationship. However, under the facts of this case, the existence of the agency relationship is determinative of *both* substantive liability and *in personam* jurisdiction.

If there is no agency relationship, there is no basis for Texas to assert *in personam* jurisdiction over Zac Smith. *See Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492-93 (5th Cir. 1974). The facts of this case show that there is not even a *prima facie* case of such a relationship. As the dissenting opinion in the Texas Supreme Court pointed out:

> [T]he contract for the elevators, which is the center of this litigation, was *solely* between Otis [Elevator] and Advanced Concrete. Smith did not ratify the contract and Smith was not even associated with Advanced Concrete until after the contract was created.

(App. p. 10a).

This reveals the fundamental misunderstanding of the facts of the case by the majority of the Texas Supreme Court. The majority failed to comprehend that the failure of the proposed joint venture removed the one and only possible basis for the assertion of *in personam* jurisdiction over Zac Smith, in an action by a third party with whom Zac Smith had no other contact.

III. The Holding of the Texas Supreme Court Is Contrary to the Principles of *In Personam* Jurisdiction Laid Down by This Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), Because the Texas Supreme Court Failed to Consider That the Exercise of *In Personam* Jurisdiction in This Case Is Unreasonable and Contrary to "Fair Play and Substantial Justice."

Even if there were a consummated joint venture, or some other purposeful activity by Zac Smith, the Texas court's assertion of *in personam* jurisdiction must be reasonable and just. The following undisputed facts demonstrate that it would be wholly unreasonable, and contrary to "traditional notions of fair play and substantial justice," to allow Texas to assert *in personam* jurisdiction over Zac Smith in this case:

1. No bonding for construction was issued. This was a condition precedent for the construction contract.

2. The proposed joint venture agreement between Advanced Concrete and Zac Smith was not executed until *after* Advanced Concrete had already signed its contract with Otis Elevator.

3. Otis Elevator solicited the contract from Advanced Concrete, and not Zac Smith.

4. Advanced Concrete made no mention of Zac Smith in its negotiations with Otis Elevator.

5. Otis Elevator knew nothing of Zac Smith until four months *after* the signing of the elevator contract.

6. Zac Smith did not authorize Advanced Concrete to act on behalf of the proposed joint venture until several months *after* Advanced Concrete signed its contract with Otis Elevator. Zac Smith never authorized or ratified the elevator contract.

7. Zac Smith knew nothing of the elevator contract until Otis Elevator filed this lawsuit, almost a year after Advanced Concrete signed the contract.

Under these facts, Zac Smith could have had no reasonable anticipation of being haled into a Texas court to answer for some unilateral action by Advanced Concrete. Zac Smith had no notice or knowledge of any obligations to third parties. Furthermore, it would be unreasonable to hold that Zac Smith should have expected or known of such obligations, since Double W and Advanced Concrete never took the basic steps to get the hotel project off the ground.

In briefing and argument before the Texas Supreme Court, Otis Elevator made much of the fact that Zac Smith knew that elevators would be used in the hotel. This revelation of Zac Smith's foresight is hardly shocking in view of the fact that the proposed project called for an 18-story hotel. Yet the Texas Supreme Court

impliedly relied upon this in its decision to uphold *in personam* jurisdiction over Zac Smith. (App. p. 7a). Such reliance reveals another fundamental error by the Texas Supreme Court in its attempt to apply the proper Constitutional standards.

To the extent that foreseeability is important, it is *not* the foreseeability that elevators would be required in an 18-story hotel. "[T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The foreseeability question must be answered considering these facts: no construction bond was issued for the project, and Double W failed to obtain financing to pay for construction of the hotel, including the elevators that Advanced Concrete ordered. In light of these facts, Zac Smith could not have reasonably anticipated being forced to litigate a dispute in a Texas court with some unknown third party like Otis Elevator. There is no reason Zac Smith should have expected Advanced Concrete to order elevators when there was neither bonding to cover construction, nor financing to pay for the hotel or its elevators.

Under Texas law, a non-resident defendant who specially appears to contest a trial court's exercise of *in personam* jurisdiction must "negate all bases of personal jurisdiction." *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985). In this case, the Texas Court of Appeals held that Zac Smith failed to meet this burden of proving a negative (App. p. 15a), and the Texas Supreme Court affirmed that ruling by upholding *in personam* jurisdiction over Zac Smith. Under a long line of decisions by this Court, non-resident defendants are entitled to due process under the Constitution of the United States. It is hardly fair and reasonable to place an affirmative burden upon non-resident defendants like Zac

Smith to prove their entitlement to Constitutional due process by requiring that they prove a negative, something that is exceedingly difficult to prove in any context.

The Texas Supreme Court's majority opinion also vastly overstated the interest of the State of Texas in providing a forum for this dispute. The State of Texas has no compelling interest in this litigation. Otis Elevator is not a Texas company. Otis Elevator is a New Jersey corporation, with corporate headquarters in Connecticut, manufacturing facilities in Indiana and New Jersey, doing business in most if not all of the fifty states. Furthermore, Texas already provided Otis Elevator with its day in court against the only proper defendant in this lawsuit—Advanced Concrete. Otis Elevator sued Advanced Concrete in Texas, obtaining a judgment for all damages sought. These facts present no basis for enhancing the power of Texas courts to control persons beyond their territorial boundaries. Such enhanced powers would be detrimental to both fundamental interests at stake in this case—the traditional concepts of federalism that maintain limits on state powers *and* Zac Smith's right to due process guaranteed by the Fourteenth Amendment.

The majority of the Texas Supreme Court also failed to consider that the burden on Zac Smith to litigate this dispute in Texas is severe when compared with any burden upon Otis Elevator to sue in Florida, where Otis Elevator already does considerable business. Zac Smith is in the construction business and must obtain bonding to cover its work. However, Zac Smith has been unable to obtain bonding, and hence has been unable to obtain work. Despite the dubious nature of Otis Elevator's claim, Zac Smith is still required to disclose to bonding companies the existence of Otis Elevator's lawsuit and a potential judgment in excess of $500,000. Forcing Zac Smith to litigate this dispute in Texas would serve only

to unreasonably increase the existing financial burden upon Zac Smith.

This Court stated in *Burger King*, "the facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice." —— U.S. ——, 105 S.Ct. at 2189. The facts of this case demonstrate that the assertion of *in personam* jurisdiction over Zac Smith is unreasonable and unjust.

CONCLUSION

For the reasons set forth above, Petitioner urges that this petition for writ of certiorari be granted.

Respectfully submitted,

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Zac Smith & Company, Inc.

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF TEXAS
FROM TRAVIS COUNTY
THIRD DISTRICT

No. C-5875

ZAC SMITH & COMPANY, INC.,
Petitioner

v.

OTIS ELEVATOR COMPANY,
Respondent

Otis Elevator Company, a New Jersey corporation, filed suit in Texas against Advanced Concrete of Texas, a Texas corporation, and Zac Smith & Company, Inc. (Smith), of Florida, for breach of contract in the sale of four elevators to be installed in a hotel in Austin, Texas. Smith filed a special appearance pursuant to TEX. R. CIV. P. 120a (Vernon's Supp. 1987) and asserted lack of *in personam* jurisdiction. The trial court sustained Smith's objection to jurisdiction and ordered Smith dismissed from the lawsuit. Otis Elevator appealed the dismissal of Smith from the lawsuit; the court of appeals reversed on the ground that Smith failed to meet its burden of negating all bases of personal jurisdiction. 715 S.W.2d 806. Smith asserts that it has consummated no transaction in Texas; thus, the assumption of jurisdiction in Texas offends "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). We affirm the court of appeals' judgment and hold Zac Smith & Company, Inc., has sufficient contacts with Texas to reasonably require this Florida corporation

to be subject to our long-arm statute. TEX. CIV. PRAC. REM. CODE § 17.042 (Vernon's 1986).

As the court of appeals noted, the requirement that Smith have sufficient contacts with the forum such that the exercise of jurisdiction by Texas courts does not offend "traditional notions of fair play and substantial justice" invokes federal due process guarantees. *International Shoe Co. v. Washington*, 326 U.S. at 316. The federal due process clause

> protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'

Burger King Corp. v. Rudzewicz, 105 S.Ct. 2174, 2181-2182 (1985). Thus, individuals must have "fair warning" that a "particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 105 S.Ct. at 2183; *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment). Continuing and systematic contacts may give rise to the exercise of jurisdiction in a suit not arising out of or related to the defendant's contacts with the forum. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, n. 9, 104 S.Ct. 1868, 1872, n. 9 (1984); *Burger King Corp.*, 105 S.Ct. at 2182. Where contacts with the foreign sovereign are not continuing and systematic, but rather specific jurisdiction is alleged, the "fair warning" requirement is two-fold. First, the defendant's activities must have been "purposefully directed" to the forum, and second, the litigation must result from alleged injuries that "arise out of or relate to those activities." *Burger King Corp.*, 105 S.Ct. at 2182.

The Texas long-arm statute provides that a nonresident does business in this State and thereby is subject to this State's jurisdiction if the nonresident "contracts by mail or otherwise with a Texas resident and either party is to

perform the contract in whole or in part in this state." TEX. CIV. PRAC. REM. CODE § 17.042(1). Prior to the U.S. Supreme Court's decisions in *Burger King* and *Helicopteros*, this court enunciated a three-pronged test to be applied when determining the constitutional reach of this state's jurisdiction over persons with only a single or few contacts with Texas. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978); *O'Brien v. Lanpar Co.*, 399 S.W.2d 340 (Tex. 966). In order to exercise jurisdiction, it must be found that:

> (1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

O'Brien v. Lanpar Co., 399 S.W.2d at 342.

The first prong, when established, satisfies the "purposeful availment" test required by the Due Process Clause. If a foreign defendant purposefully does some act or consummates some transaction in Texas, then that defendant purposefully has availed itself of the benefits and protections of the laws of Texas. The second prong, when shown and when coupled with the first prong of the *O'Brien* test, meets the requirements for specific personal jurisdiction to attach under *Burger King* and *Helicopteros;* i.e., the defendant purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities. *Burger King Corp.*, 105 S.Ct. at 2182.

Under the third prong of the *O'Brien* test, in evaluating the "quality, nature, and extent" of the contacts in instances wherein the defendant's activities with the forum are *not* continuing, it must be established that the defendant's contacts with the forum "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp.*, 105 S.Ct. at 2184 (emphasis original); *McGee v. International Life Insurance Co.*, 355 U.S. at 223, 78 S.Ct. at 201. Thus, courts must find the activities of the defendant to be deliberate and significant. *Burger King Corp.*, 105 S.Ct. at 2184 Once it is determined that the defendant purposefully availed itself of the benefits and protections of the laws of the forum, the burden is on the defendants to show "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp.*, 105 S.Ct. at 2185. Thus, it is incumbent upon the nonresident defendant to negate all bases of personal jurisdiction. *Siskind v. Villa Foundation for Education, Inc.*, 642 S.W.2d 434, 438 (Tex. 1982). In that regard, *Burger King* instructs:

> Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. (Citations omitted). As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a

"severe disadvantage" in comparison to his opponent. (Citation omitted).

Burger King Corp., 105 S.Ct. at 2185.

In August 1983, Smith, a Florida bonding agent, and Advanced Concrete, a general contractor and manufacturer of prefabricated building materials, were joined as a joint venture for the sole purpose of constructing a hotel in the Panhandle of Florida. In mid-August of 1983, Smith and Advanced Concrete, as a joint venture, were notified by Waldorff Insurance & Bonding Company of Fort Walton Beach, Florida, of Lumberman's Mutual Casualty Company's intent to bond an 18-story hotel in Texas as long as certain conditions were met, including that the bond be issued to the joint venture. In September 1983, Double W Investors, the owner of a tract of land in Austin, entered into a contract with Advanced Concrete for construction of an 18-story Ramada Inn on its property. On October 25, 1983, Herbert Watkins, president of Advanced Concrete, executed a contract with Otis Elevator for the manufacture, sale, delivery and installation of four elevators for the Austin hotel. Six days later, Advanced Concrete and Smith executed a joint venture agreement for the purpose of constructing the Austin hotel. The agreement provided, among other matters, that both parties were responsible for the project's superintendent and control; that Smith was to provide an on-site manager with full authority to act on behalf of Smith; and that Smith would furnish the joint venture bond and the project's working capital.

In February 1984, Double W Investors executed a new contract for construction of the hotel on its property, this time with Advanced Concrete and Smith, a joint venture, and Austin Hotel Association, Ltd. On March 28, 1984, the City of Austin issued a building permit; however, the parties dispute to whom the permit was issued. The permit recites in typewritten form that it was issued to Austin Hotel Association, Ltd., and Advanced Concrete

of Texas. Following "Advanced Concrete of Texas" is the handwritten notation "and Zac Smith Co., a Joint Venture." The director of the city's building inspection department certified that the permit was issued to "Advanced Concrete of Texas and Zac Smith, JTV." Lumberman's Mutual, as surety, issued a bonding and escrow agreement to the joint venture on April 12, 1984, in the amount of $9,856,000 for construction of the hotel; however, the performance bond was not executed. The construction of the hotel was never realized. Meanwhile, with a delivery date of July 2, 1984, Otis Elevator proceeded with the manufacture of the four elevators under contract, and delivered the elevators to the Texas construction site, which was vacant except for a trailer.

We believe there is substantial evidence in the record supporting the court of appeals' conclusion that the exercise of jurisdiction over Smith in Texas for the alleged breach of the elevator contract does not offend due process. We recognize that a contract is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Burger King Corp.*, 105 S.Ct. at 2185; *citing Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943). In a case such as the one before us, where the foreign defendant has had a single or few contacts with the forum by virtue of a contract,

> [i]t is those two factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Burger King Corp., 105 S.Ct. at 2186.

Smith had no physical ties to Texas. The joint venture agreement was signed in Florida and mailed to Advanced

Concrete at its manufacturing plant and warehouse in Shreveport, Louisiana. Nevertheless, the joint venture was formed for the sole purpose of building a hotel in Texas, and the elevator contract is related directly to the hotel enterprise. Despite the fact that the hotel was not built, a building permit was issued for the project, the elevator contract was executed and the products under that contract were manufactured and delivered to Texas. The purpose of the joint venture was wholly performable in Texas and the contract with Double W, the property owner, was wholly performable in Texas. The parties anticipated a profit from the construction of the hotel in Texas, and the benefits and protections of the laws of this State, as well as the City of Austin, were called into play. It cannot be said that because of the sequence of events such contacts are "random," "fortuitous," or "attenuated," *Burger King Corp.*, 105 S.Ct. at 2186; nor can it be said that Smith could not anticipate being haled into court in Texas for alleged damages arising out of the hotel project, irrespective of whether project negotiations were finalized and the hotel actually was completed. Since mid-August of 1983, Smith purposefully directed its activities toward Texas residents; numerous contract negotiations for the construction of the hotel and all future consequence of the parties' course of action were directed toward Texas. The elevator contract was just one intermediate step toward finalizing the project, which was the real object of the business transaction. The due process clause may not be wielded as a territorial shield to avoid interstate obligations that have been assumed voluntarily. *Burger King Corp.*, 105 S.Ct. at 2183.

Smith also argues that jurisdiction does not attach because the joint venture agreement fails as a matter of law because the agreement does not meet the proper elements of a joint venture. Whether the joint venture agreement in fact creates a joint venture goes to the question of liability for the alleged breach, and not to the question of jurisdiction.

No findings of fact and conclusions of law were requested of or filed by the trial court; thus, all questions of fact will be presumed and found in support of the judgment. *Lassiter v. Bliss*, 559 S.W.2d 353, 358 (Tex. 1977). However, findings of fact, though unchallenged, are not conclusive on appeal when, as in this cause, a statement of facts appears in the record. *Swanson v. Swanson*, 148 Tex. 600, 603, 228 S.W.2d 146, 158 (1950); *Uvalde County v. Barrier*, 710 S.W.2d 740, 743 (Tex. App.—San Antonio 1986, no writ); *Rosetta v. Rosetta*, 525 S.W.2d 255, 260 (Tex. Civ. App.—Tyler 1975, no writ). Moreover, the rule of implied findings of fact in support of the judgment cannot be invoked when the evidence establishes as a matter of law the issue to be determined. *Lockhart v. Garner*, 156 Tex. 580, 583, 298 S.W. 2d 108, 110 (1957).

In the instant cause, the only fact in dispute is whether the City of Austin issued a building permit to the joint venture. For the sole purpose of determining jurisdiction, that fact is presumed to favor the trial court's judgment that sufficient contacts with the forum are lacking. Based on the remaining facts before the court, we hold as a matter of law that Zac Smith & Co. had sufficient contacts with Texas for personal jurisdiction to attach.

The judgment of the court of appeals is affirmed and this cause is remanded to the trial court for trial on the merits.

/s/ Oscar H. Mauzy
OSCAR H. MAUZY
Justice

OPINION DELIVERED: July 8, 1987

Dissenting Opinion by Justice Robertson joined by Justices Ray and Wallace.

IN THE SUPREME COURT OF TEXAS
FROM TRAVIS COUNTY
THIRD DISTRICT

No. C-5875

ZAC SMITH & COMPANY, INC.,
Petitioner,

v.

OTIS ELEVATOR COMPANY,
Respondent.

DISSENTING OPINION

I respectfully dissent. The crucial issue here is whether this foreign corporation has enough contacts with the forum to satisfy the requirements of due process. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). The nonresident corporate defendant must have sufficient minimum contacts with the forum state so that the maintenance of a suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). If Zac Smith & Co.'s contacts with the State of Texas are insufficient to satisfy due process requirements then the case should be reversed. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 419-20 (1984). The "quality and nature" of Smith's contacts with Texas must be examined and weighed against the "fair and orderly administration of the laws." *Shaffer*, 433 U.S. at 204. Finally, it must be determined whether Smith could reasonably anticipate being brought into court in Texas. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The majority here recognizes that Smith has a single or a few contacts with the forum and has "no physical ties to Texas" but determines nevertheless, that sufficient

contacts exist to support the jurisdiction. The majority, however, cannot justify the finding of jurisdiction precisely because Smith's contacts with the forum are certainly "attenuated." *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2186 (1985). The due process clause is not being used here as a shield to avoid its obligations but rather as the guaranteed protection against a suit which offends the traditional notions of fair play. *Burger King Corp.*, 105 S.Ct. at 2183. Specifically in this case, the contacts the majority argues are sufficient to gain jurisdiction are solely the result of attenuated contacts. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

The only contact that Smith has with Texas is a proposed joint venture agreement with Advanced Concrete which was specifically conditioned on the satisfactory and sufficient bonding of the project. No bond was ever issued and the joint venture agreement was never consummated. Furthermore, the contract for the elevators, which is the center of this litigation, was solely between Otis Engineering and Advanced Concrete. Smith did not ratify the contract and Smith was not even associated with Advanced Concrete until after the contract was created.

This case is most like the *Helicopteros* case in terms of the contacts of the nonresident defendant with the forum and should be decided accordingly. I would reverse the judgment of the court of appeals and hold that Zac Smith & Company has insufficient minimum contacts with Texas in order to maintain jurisdiction.

/s/ Ted Robertson
TED ROBERTSON
Justice

OPINION DELIVERED: July 8, 1987

Justice Ray and Wallace join in this dissent.

IN THE COURT OF APPEALS
THRD SUPREME JUDICIAL DISTRICT OF TEXAS
AT AUSTIN

No. 14,517

OTIS ELEVATOR COMPANY,
Appellant

VS.

ZAC SMITH & COMPANY, INC.,
Appellee

From the District Court of Travis County,
353rd Judicial District No. 373,651,
Honorable Joseph H. Hart, Judge Presiding

Otis Elevator Company appeals from an order of the district court dismissing its lawsuit against Zac Smith & Company, Inc. ("Smith"), for lack of in personam jurisdiction. This Court will set aside the order of the district court and remand the cause for trial on the merits.

Otis sued Smith and Advanced Concrete of Texas, Inc., for breach of a contract for purchase of four elevators to be used in the construction of a hotel in Austin. Smith, a Florida corporation, filed a special appearance asserting it was not amenable to process and to the jurisdiction of the courts of this state. Tex. R. Civ. P. Ann. 120a (Supp. 1986). The trial court, after a hearing, sustained Smith's objection to jurisdiction and ordered Smith dismissed from the cause. It is from this order that Otis appeals.

In September 1983, Double W Investors, an Austin property owner, entered into a contract with Advanced

Concrete to build a hotel on its property. On October 25, 1983, the president of Advanced Concrete, Herbert Watkins, signed an agreement with Otis to purchase four elevators for the project. Six days later, Advanced Concrete entered into a joint venture agreement with Smith in which the parties agreed that Smith would obtain the required bond for the project and Advanced Concrete would provide a project manager at the construction site. On February 2, 1984, Double W Investors entered into a contract for construction of the hotel with the Advanced Concrete/Smith joint venture. In a letter signed by Smith's president on March 19, 1984, Watkins was authorized to act on behalf of the joint venture on all matters pertaining to its purpose. The City of Austin issued a building permit to Advanced Concrete and Smith as a joint venture in March 1984. The evidence indicates that Smith had no continuous or systematic business activity in Texas, and that its contacts with this state are limited to those previously mentioned.

By its first point of error, Otis challenges the trial court's determination that Smith was not subject to the jurisdiction of the courts of this state. In a Rule 120a special appearance hearing, a nonresident defendant has the burden of proof to negate all bases of personal jurisdiction. Siskind v. Villa Foundation for Education, Inc., 642 S.W.2d 434, 438 (Tex. 1982). The courts of this state apply a three-pronged test to determine the constitutional reach of the state's jurisdiction over non-residents who maintain only a single or few contacts with Texas. *Id.* at 436; U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). To maintain jurisdiction over nonresidents such as Smith

> (1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause

> of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Siskind v. Villa Foundation for Education, Inc., *supra*, *quoting O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966).

The Texas "long-arm" statute provides that a nonresident entering into a contract with a Texas resident performable in part by either party in Texas shall be deemed to be doing business in Texas. Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (1986); U-Anchor Advertising v. Burt, *supra* at 762. Smith's acts of entering into the joint venture agreement with Advanced Concrete, authorizing Watkins to act as an agent for the joint venture, contracting with Double W Investors to participate as a joint venture in the hotel's construction, and applying for and receiving a building permit from the City of Austin satisfy the first prong of the *O'Brien* test.

Smith contends that Texas courts cannot assert jurisdiction over it in this cause because of the requirement that the cause of action must arise from, or be connected with, its acts or transactions in this state. Smith argues that the elevator contract was signed prior to the execution of the joint venture agreement; that the elevator contract was an agreement between Otis and Advanced Concrete only; that the joint venture never adopted the contract; and that Smith never ratified the agreement. Because the suit is on the contract to which Smith is not a party, Smith maintains that the trial court's jurisdiction fails under the second prong of the *O'Brien* test.

This Court has determined that the cause of action is sufficiently connected with Smith's acts in this state so as to confer jurisdiction in this cause. Each party to a joint venture is legally responsible for the acts of the other joint venturer peformed within the scope of the enterprise and resulting in injury to a third person. Ked-Wick Corp. v. Levinton, 681 S.W.2d 851, 858 (Tex. App. 1984, no writ). A joint venturer may bind his associates by a contract made in furtherance of the joint enterprise. R. L. Lipsey, Inc. v. Panama-Williams, Inc., 611 S.W.2d 917 (Tex. Civ. App. 1981, writ ref'd n.r.e.); Federal Underwriters Exchange v. Coker, 116 S.W.2d 922 (Tex. Civ. App. 1938, writ dism'd). Smith's president testified that he knew elevators would be necessary for the project when he entered into the agreement. Although the contract between Otis and Advanced Concrete was never explicity ratified by Smith or the joint venture, it is sufficiently related to the entire transaction so as to make Smith amenable to service of process in the matter. This Court specifically declines, of course, to rule on the ultimate issue of whether Smith is liable under the contract; we hold here only that the contract is sufficiently connected with Smith's acts in Texas so as to confer jurisdiction in this cause.

The requirement that Smith have had minimum contacts such that the exercise of jurisdiction by Texas courts would not "offend traditional notions of fair play and substantial justice" involves federal due process guarantees. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The United States Supreme Court has stated that the "minimum contacts" test depends first on whether the cause of action relates to or arises out of the defendant's contacts with Texas. If it does not, then Smith must have had continuous and systematic business activity here. If it does, then the relationship among Smith, the forum, and the litigation is the proper focus. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

Smith "purposefully availed" itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of Texas laws by entering into contracts to be performed in Texas and obtaining the building permit from the City of Austin. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). Because we conclude that the cause of action relates to Smith's contacts with Texas, and because Smith purposefully availed itself of the laws of this state, the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.

Smith failed to meet its burden of negating all bases of personal jurisdiction at the special appearance hearing. We sustain Otis' first point of error. Because of our disposition, we do not reach the other points raised by Otis. The trial court's order sustaining Smith's objection to the jurisdiction is set aside and the cause is remanded for trial on the merits.

BOB GAMMAGE
Justice

[Before Chief Justice Shannon, Justices Gammage and Carroll]

Order of the Trial Court Set Aside and Cause Remanded for Trial

Filed: August 13, 1986

[State of Texas Seal]

May 30, 1985

JOSEPH H. HART
District Judge
124th Judicial District Court

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Re: Cause No. 373,651: *Otis Elevator Co. v. Advanced Concrete of Texas, Inc. and Zac Smith & Co., Inc., et al.*

Dear Counsel:

After considering the evidence presented and the arguments of counsel at the hearing for Special Appearance of Defendant Zac Smith & Co., Inc. I have reached a decision on the special appearance.

Waiver

I shall not hold that discovery alone, whether or not beyond jurisdictional issues, is enough to waive special appearance. In *Portland Savings vs. Bernstein*, No. 13-83-511-CV (Tex. App.—Corpus Christi 1984, no writ) (not yet reported) a waiver was found not just because of discovery, but also because of additional steps taken by defendant. Only discovery measures have been taken here, and they are permissible within the literal reading of Rule 120a.

Contacts

One of the prongs of the three-pronged test used in Texas is that the cause of action must arise out of the contacts with the forum state. *O'Brien v. Lanpar Company*, 399 S.W. 2d 340 (Tex. 1966); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W. 2d 760 (Tex. 1977). That element is unnecessary when the nonresident defendant's presence in the forum through numerous contacts is of such a nature so as to satisfy the demands of the ultimate test of due process. *Hall v. Helicopteros Nacionales de Colombia*, 638 S.W. 2d 870,872 (Tex. 1982); however, it "is a necessary requirement where the nonresident defendant only maintained single or few contacts with the forum." *Id.*

The evidence presented to me indicates that the cause of action did not arise out of Zac Smith & Co., Inc.'s contact with Texas, but out of Plaintiff's contract with defendant Advanced Concrete of Texas, Inc. Any contact by defendant Smith with Advanced Concrete or with Texas only resulted after this original subcontract. Plaintiff's own representative never had contact with defendant Smith. (Walden Deposition, p. 37, ll. 9-10; p. 41, ll. 11-14). The deposition testimony and the documentary exhibits received in evidence show only minimal contacts in Texas, not enough to satisfy the exception found in *Helicopteros.*

Based on the foregoing, the special appearance will be granted. I request that Mr. Howard prepare and submit to me for signature after approval as to form by Mr. Broussard a draft of an order sustaining Defendant Zac Smith & Co. Inc's Special Appearance.

Very truly yours,

/s/ Joseph H. Hart
JOSEPH H. HART
Judge,
126 District Court
Travis County, Texas

JHH/jw

cc: Mr. John Dickson
Travis County District Clerk

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IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
353RD JUDICIAL DISTRICT

No. 373,651

OTIS ELEVATOR COMPANY,
Plaintiffs,

v.

ADVANCED CONCRETE OF TEXAS, INC. and
ZAC SMITH & COMPANY, INC.,
Defendants.

ORDER SUSTAINING OBJECTION TO JURISDICTION

On the 23rd day of May, 1985, came on to be heard the Special Appearance of Zac Smith & Company, Inc., Defendant in the above styled and numbered cause. Defendant Zac Smith & Company, Inc., moved the Court to dismiss the cause on the grounds that Defendant is not amenable to process issued by the Courts of this State. All parties to such proceedings were duly notified of said hearing. Defendant Zac Smith & Company, Inc., specially appeared by counsel, and Plaintiff, Otis Elevator Company and Intervenor RepublicBank South Austin appeared by Counsel. The Court, having considered the pleadings, evidence and arguments of the counsel, is of the opinion and finds that Defendant Zac Smith & Company, Inc. has specially appeared to contest personal jurisdiction and has not generally appeared in this cause, and further that the Court does not have jurisdiction over the Defendant's person, and that such motion to the jurisdiction should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that such motion be and the same is hereby sustained, and that this cause against Defendant Zac Smith & Company, Inc. be and is hereby in all things dismissed for lack of personal jurisdiction over Defendant Zac Smith & Company, Inc.

Signed this 11th day of June, 1985.

/s/ Joseph H. Hart
JUDGE JOSEPH H. HART

Approved as to Form:

/s/ J. Scott Howard
J. SCOTT HOWARD
Attorney for Defendant
Zac Smith & Company, Inc.

/s/ Tom Broussard
TOM BROUSSARD
Attorney for Plaintiff
Otis Elevator Company

IN THE SUPREME COURT OF TEXAS
FROM TRAVIS COUNTY
THIRD DISTRICT

No. C-5875

ZAC SMITH & COMPANY, INC.,
Petitioner

vs.

OTIS ELEVATOR COMPANY,
Respondent

This cause was heard on writ of error to the Court of Appeals for the Third District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

It is the opinion of the court, (Justice Oscar H. Mauzy, author; Justice Ted Z. Robertson dissenting joined by Justices C. L. Ray and James P. Wallace), there is no error in the judgment of the court of appeals. The court of appeals reversed the judgment of the trial court on the ground that Smith failed to meet its burden of negating all bases of personal jurisdiction and remanded the cause for trial. The trial court ordered Smith dismissed from the lawsuit.

In accordance with the opinion of this court, it is ordered that:

1) as Zac Smith & Company has sufficient contacts with Texas to be subject to Texas' long-arm statute, the judgment of the court of appeals is affirmed.

2) Therefore, the cause is remanded to the trial court for trial.

3) Zac Smith & Company, Inc. shall pay the costs in this court and the court of appeals.

4) Otis Elevator Company shall recover its costs in those courts from Zac Smith & Company, Inc.

A copy of this judgment with a copy of the opinion shall be certified to the District Court of Travis County, Texas for observance.

(Opinion by Justice Mauzy)

(Dissenting opinion by Justice Robertson)

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 16, 1987

Mr. Larry F. York
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Broussard & Broussard
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1122 Colorado
Austin, TX 78701

RE: Case No. C-5875

STYLE: ZAC SMITH & COMPANY, INC.
v. OTIS ELEVATOR COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

MARY M. WAKEFIELD
Clerk

By /s/ Blanca E. Morin
Deputy

IN THE DISTRICT COURT
353RD JUDICIAL DISTRICT
OF TRAVIS COUNTY, TEXAS

No. 373,651

OTIS ELEVATOR COMPANY

v.

ZAC SMITH & COMPANY, INC.

SPECIAL APPEARANCE OF
ZAC SMITH & COMPANY, INC.

COMES NOW Zac Smith & Company, Inc. and files this its Special Appearance herein and as grounds for such would show the following:

I.

Defendant Zac Smith has not in the past and is not now doing business in the State of Texas and is not amenable to process by the Courts of Texas. This Court is without jurisdiction over this Defendant.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this cause be dismissed as to this defendant and for such other relief as may be appropriate.

Respectfully submitted,

BAKER & BOTTS

By /s/ Larry F. York
LARRY F. YORK
TBA No. 22164000
J. SCOTT HOWARD
TBA No. 10071500
1410 United Bank Tower
Austin, Texas 78701
(512) 478-1234

Attorneys for Defendant
Zac Smith & Company, Inc.

THE STATE OF FLORIDA
COUNTY OF ESCAMBIA

BEFORE ME, the undersigned authority, on this day personally appeared ZAC SMITH, who, on his oath, stated that he is President of Zac Smith & Company, Inc., and as such is entitled to make this affidavit that the foregoing statements are true and correct.

/s/ Zac Smith
ZAC SMITH

SUBSCRIBED AND SWORN TO BEFORE ME the undersigned authority on this the 17th day of February, 1985.

/s/ [Illegible]
Notary Public in and for
the State of Florida

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to counsel, Tom Broussard, Attorney for Plaintiff, Broussard & Broussard, Westgate Tower, Suite 2300, 1122 Colorado, Austin, Texas 78701, by certified mail, return receipt requested on this 14th day of February, 1985.

/s/ Larry F. York
LARRY F. YORK

TEXAS CIVIL PRACTICE AND REMEDIES CODE

§ 17.041. Definition

In this subchapter, "nonresident" includes:

(1) an individual who is not a resident of this state; and

(2) a foreign corporation, joint-stock company, association, or partnership.

§ 17.042. Acts Constituting Business in This State

In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

(2) commits a tort in whole or in part in this state; or

(3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

§ 17.043. Service on Person in Charge of Business

In an action arising from a nonresident's business in this state, process may be served on the person in charge, at the time of service, of any business in which the nonresident is engaged in this state if the nonresident is not required by statute to designate or maintain a resident agent for service of process.

§ 17.044. Substituted Service on Secretary of State

(a) The secretary of state is an agent for service of process or complaint on a nonresident who:

(1) is required by statute to designate or maintain a resident agent or engages in business in this state, but has not designated or maintained a resident for service of process;

(2) has one or more resident agents for service of process, but two unsuccessful attempts have been made on different business days to serve each agent; or

(3) is not required to designate an agent for service in this state, but becomes a nonresident after a cause of action arises in this state but before the cause is matured by suit in a court of competent jurisdiction.

(b) The secretary of state is an agent for service of process on a nonresident who engages in business in this state, but does not maintain a regular place of business in this state or a designated agent for service of process, in any proceeding that arises out of the business done in this state and to which the nonresident is a party.

§ 17.045. Notice to Nonresident

(a) If the secretary of state is served with duplicate copies of process for a nonresident, he shall require a statement of the name and address of the nonresident's home or home office and shall immediately mail a copy of the process to the nonresident.

(b) If the secretary of state is served with process under Section 17.044(a)(3), he shall immediately mail a copy of the process to the nonresident (if an individual), to the person in charge of the nonresident's business, or to a corporate officer (if the nonresident is a corporation).

(c) If the person in charge of a nonresident's business is served with process under Section 17.043, a copy of the process and notice of the service must be immediately mailed to the nonresident or the nonresident's principal place of business.

(d) The process or notice must be sent by registered mail or by certified mail, return receipt requested.

Rule 120a. Special Appearance

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearances. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.